

**Motor Lodge Associates, d/b/a Howard Johnson's Motor Lodge and Service Employees International Union, Local 18, AFL-CIO. Case 32-CA-4738**

February 4, 1983

### DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND  
HUNTER

Upon a charge filed on August 17, 1982, by Service Employees International Union, Local 18, AFL-CIO, herein called the Union, and duly served on Motor Lodge Associates, d/b/a Howard Johnson's Motor Lodge, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint on September 15, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 19, 1982, following a Board election in Case 32-RC-1513, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;<sup>1</sup> and that, commencing on or about July 24, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. Thereafter, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and raising certain "affirmative" defenses.

On October 21, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment with exhibits attached. Subsequently, on October 28, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On November 8, 1982, the Union joined in

the General Counsel's Motion for Summary Judgment. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

#### Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent admits the request and refusal to bargain. Respondent, however, asserts that the Board's certification of the Union was improper on the basis of Respondent's objections to the election.

Review of the record herein, including the record in Case 32-RC-1513, reveals that an election, conducted pursuant to a Stipulation for Certification Upon Consent Election on January 19, 1982, resulted in a vote of 18 for, and 16 against, the Union with one challenged ballot. Thereafter, Respondent filed timely objections to the election, alleging, in substance that: (1) the Union distributed campaign literature containing material misrepresentations immediately prior to the election, (2) the voting area was inadequately described in the notice to employees, and (3) the Board agent failed to designate an official time period.

After investigation, the Regional Director issued his Report and Recommendations on Objections on April 6, 1982, in which he recommended that Respondent's objections be overruled in their entirety and that the appropriate certification issue. Thereafter, Respondent filed timely exceptions to the Regional Director's report. On July 19, 1982, the Board, having considered the Regional Director's report, adopted the findings and recommendations of the Regional Director, and certified the Union as the exclusive bargaining representative of the employees in the unit stipulated to be appropriate. It thus appears that Respondent is attempting in this proceeding to relitigate issues fully litigated and finally determined in the representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>2</sup>

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 32-RC-1513, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

<sup>2</sup> See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

In this proceeding, Respondent contends that it is entitled to a hearing on its objections to the election. Prior to adopting the findings and recommendations of the Regional Director's report, the Board considered the report, Respondent's exceptions thereto, and the entire record in that case. By its adoption of the report recommending that Respondent's objections be overruled, the Board necessarily found that the objections raised no substantial or material issues warranting a hearing.<sup>3</sup> Further, it is well established that the parties do not have an absolute right to a hearing on objections to an election. It is only when the moving party presents a *prima facie* showing of substantial and material issues which would warrant setting aside the election that it is entitled to an evidentiary hearing. It is clear that, absent arbitrary action, this qualified right to a hearing satisfies the constitutional requirements of due process.<sup>4</sup> Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

#### FINDINGS OF FACT

##### 1. THE BUSINESS OF RESPONDENT

Motor Lodge Associates, d/b/a Howard Johnson's Motor Lodge, a partnership existing under the laws of the State of California, with an office and place of business in Dublin, California, is engaged in the operation of a motor lodge. During the 12-month period preceding issuance of the complaint, the Employer in the course and conduct of its business received gross revenues in excess of \$500,000 and during the same period the Employer purchased and received goods valued in excess of \$5,000 from sources located directly outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material

herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

##### II. THE LABOR ORGANIZATION INVOLVED

Service Employees International Union, Local 18, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE UNFAIR LABOR PRACTICES

###### A. *The Representation Proceeding*

###### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All housekeeping employees, maintenance employees, front desk clerks, bellmen and security employees employed by the Employer at its Dublin, California location; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

###### 2. The certification

On January 19, 1982, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 32, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 19, 1983, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

###### B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about July 23, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about July 24, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since July 24, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclu-

<sup>3</sup> *Madisonville Concrete Co., A Division of Corum & Edwards, Inc.*, 220 NLRB 668 (1975); *Evansville Auto Parts, Inc.*, 217 NLRB 660 (1975).

<sup>4</sup> *GTE Lenkurt, Incorporated*, 218 NLRB 929 (1975); *Heavenly Valley Ski Area, a California Corporation, and Heavenly Valley, a Partnership*, 215 NLRB 734 (1974); *Amalgamated Clothing Workers of America [Winfield Manufacturing Company, Inc.] v. N.L.R.B.*, 424 F.2d 818, 828 (D.C. Cir. 1970).

sive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

#### CONCLUSIONS OF LAW

1. Motor Lodge Associates, d/b/a Howard Johnson's Motor Lodge, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Service Employees International Union, Local 18, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All housekeeping employees, maintenance employees, front desk clerks, bellmen and security employees employed by the Employer at its Dublin, California location; excluding all other employees, office clerical employees, professional employees,

guards, and supervisors as defined by the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 19, 1982, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 24, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Motor Lodge Associates, d/b/a Howard Johnson's Motor Lodge, Dublin, California, its, officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Service Employees International Union, Local 18, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All housekeeping employees, maintenance employees, front desk clerks, bellmen and security employees employed by the Employer at its Dublin, California location; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at the Employer's Dublin, California, facility copies of the attached notice marked "Appendix."<sup>5</sup> Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

<sup>5</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Service Employees International Union, Local 18, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All housekeeping employees, maintenance employees, front desk clerks, bellmen and security employees employed by the Employer at its Dublin, California location; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

MOTOR LODGE ASSOCIATES, D/B/A  
HOWARD JOHNSON'S MOTOR LODGE